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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-415

PORTLAND CEMENT ASSOCIATION, An Illinois Not-For-Profit Corporation, *Petitioner*

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, *Respondent*

MEDUSA CORPORATION NORTHWESTERN STATES PORTLAND CEMENT CO., *Intervenors*

BRIEF AMICI CURIAE OF ESSEX CHEMICAL CORPORATION, E. I. DUPONT DE NEMOURS & COMPANY, INC., AND STAUFFER CHEMICAL COMPANY IN SUPPORT OF THE PETITION OF THE PORTLAND CEMENT ASSOCIATION FOR ISSUANCE OF A WRIT OF CERTIORARI

DONALD L. MORGAN
1250 Connecticut Ave., NW
Washington, D.C. 20036
Attorney for Amici Curiae

Of Counsel:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, NW
Washington, D.C. 20036

November 3, 1975

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INTEREST OF AMICI CURIAE

Each of the *amici curiae* is a domestic corporation engaged in the manufacture of chemicals. These corporations are subject to numerous federal, state, and local regulations that impose sanctions where emissions to the atmosphere from production facilities exceed specified opacity limits. These regulations include a federal regulation of the opacity of emissions from

"new source" sulfuric acid plants that is quite similar to the opacity regulation being challenged in this action by the Portland Cement Association. *See Essex Chemical Co., et al.* v. *Ruckelshaus,* 486 F.2d 427 (D.C. Cir. 1973) (remanding for further consideration of opacity and other aspects of EPA regulations). That new regulation is only illustrative of the interest of *amici* in the inappropriateness of opacity as a limit on the emission of pollutants to the atmosphere; myriad similar regulations have produced substantial controversy throughout the nation for the past several years. Most of this controversy is attributable to the inherent subjective nature of enforcement of opacity regulations and to the absence of direct or consistent correlation between opacity and the quantity of pollutant emissions. Whether these acknowledged infirmities preclude use of opacity to govern the quantity of emissions is an important question of federal law on which this Court should rule. Such a ruling should not only settle the matter insofar as federal law is concerned, but should also have substantial significance for state and local laws and regulations.

ARGUMENT

I. Opacity Standards Have Substantial Importance for Both Industry and Regulatory Authorities

Opacity is very much in vogue as a regulatory device. Its principal virtue, from the standpoint of the regulators, is its seeming ease of application. An enforcement official merely has to look at a plume of emissions to determine whether excessive quantities of pollutants are being emitted. No scientific measuring equipment is needed, no analytical equipment or processes are needed to interpret or quantify the measurement, very little

time is required, no notice need be given to the facility being examined, and no access to the facility is necessary. Indeed, citations for violations of opacity limits have resulted from observations made by enforcement officials while driving to work; other citations have been based on observations through binoculars at very long ranges.

Moreover, the probabilities for successful prosecution of a citation are very good. The object of the citation generally would not learn of it until many hours or even days have passed, generally would not have had its own personnel looking at the emissions at the same time, and thus would not have a factual basis for directly contradicting the enforcement official's views as to what the opacity had been.

On the other hand, it is not uncommon for a plant to be operating normally throughout a period, with all required instruments indicating that mass emission limits were being complied with, with opacity observations from time to time confirming normal operations, and yet to be cited for an opacity violation at some other time during the period. In other cases, opacity limits have clearly been exceeded even though mass emissions, as measured by accurate scientific equipment, were under the specified limits. One of the *amici,* duPont, presently has a facility in Cleveland producing sodium silicate where mass emissions average only two-thirds of the limit specified in the City of Cleveland Air Pollution Code, but where opacity levels appear to be as high as 30 percent, but the Code specifies a 20 percent limit. Estimated costs of complying with the opacity limit, by a very substantial reduction of mass emissions, are $800,000 at this one facility. (A variance request is pending.)

The experience of the *amici,* and of many others in the chemical industry, demonstrates that enforcement of opacity limits is producing, and seems certain to continue to produce, substantial numbers of vexatious controversies, at federal, state, and local levels. Quite apart from individual enforcement disputes, there has been much litigation over the validity of opacity statutes and regulations themselves. *E.g., State* v. *Fry Roofing Co.,* 495 P.2d 751 (Oregon, 1972).

II. Implementation of Opacity Limits Is Inherently Arbitrary and Capricious

Generally, and for EPA's "new source" standards in particular, "opacity" refers to a specified degree of obscuration of background light by an emissions plume, as such obscuration appears to an enforcement official. Although in EPA's case such officials must periodically obtain some schooling and pass a visual observation test (under relatively constant conditions), human observations of opacity inherently have a large subjective element, and error is common. The most that EPA requires with respect to accuracy is that, at the time of schooling and testing, an enforcement official err by no more than 15 percent opacity on any one "reading" and by no more than 7.5 percent on the average. Thus an official who erred by 10 percent on half of the test readings and 5 percent on the other half would be qualified to issue citations—over the next six months—toward the end of which, at least, errors might well be larger than at the time of schooling and testing. 39 Fed. Reg. 39874-75 (Nov. 12, 1974).

The opacity limit for Portland Cement plants is 20 percent; a 10 percent opacity error thus is an error of 50 percent of what is theoretically being measured. For sulfuric acid plants, EPA's opacity limit is 10 percent;

a 10 percent opacity error there is a 100 percent error. EPA's response is that no measuring 'instrument" is precisely accurate, and the "accuracy of the method must be taken into account" in enforcement situations. 30 Fed. Reg. 39874 (Nov. 12, 1974). Even if this means no citation will issue for an observed opacity within 7.5 percent of the limit (and that is far from clear), "qualified" enforcement personnel might well err by 10 percent opacity or more, and could successfully (albeit erroneously) prosecute a citation violation with ease.[1]

Quite apart from the human error involved, opacity regulations are arbitrary and capricious because there is no necessary correlation between the quantity or mass of pollutants omitted, and the actual opacity of the emissions. For example, three small particles aggregating only half the mass of one large particle may produce greater opacity than the large particle. Actual opacity will also vary with the diameter of a stack, the vertical speed of the emissions, the wind speed, the background (and the contrast in the color of the background and the color of the emissions), and other factors that are unaffected by the quantity of emissions. *See, e.g.,* 39 Fed. Reg. 39872 (Nov. 12, 1974). Yet, the only asserted justification for opacity regulations is to regulate the quantity of emissions.[2] These factors present sub-

[1] The Ringlemann scheme for measuring opacity, in general use today, was developed many years ago for measuring very dense plumes of black smoke. Where opacity is 80 percent, a 10 percent error is obviously less significant than where it is 10 percent. There are also obvious difficulties in applying to white or other light colored emissions a technique developed for black smoke.

[2] For example, water and water vapor, which is often quite opaque, is not regulated (even though in practice some observers will have difficulty distinguishing between water and other emissions).

stantial questions in light of rulings of this court that have required a direct and constant relationship between a statutory purpose—here, to limit mass emissions—and some indirect means of achieving that purpose, such as opacity. *E.g., Vlandis* v. *Kline,* 412 U.S. 441, 452 (1973).

CONCLUSION

For the foregoing reasons and the reasons presented in the Petition for a Writ of Certiorari submitted by the Portland Cement Association, this Court should grant that petition.

Respectfully submitted,

DONALD L. MORGAN
1250 Connecticut Ave., NW
Washington, D.C. 20036
Attorney for Essex Chemical Corporation, E. I. duPont de Nemours & Company, Inc., and Stauffer Chemical Company.

Of Counsel:

CLEARY, GOTTLIEB, STEEN & HAMILTON
1250 Connecticut Avenue, NW
Washington, D.C. 20036

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